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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO ROBLES,

Defendant and Appellant.

F035731

(Super. Ct. No. 642789-2)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. James L. Quaschnick, Judge.

M. D. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Carlos A. Martinez and Catherine G. Tennant, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Mario Robles was convicted of felony driving with a blood alcohol content in excess of .08 and driving while intoxicated. (Veh. Code, § 23152, subds. (a)

and (b).)[1] The jury found Robles had incurred two prior convictions that qualified as strikes and had served three prior prison terms. He was sentenced to a determinate term of three years as a result of the prior prison convictions and an indeterminate term of twenty-five years to life for the Vehicle Code violation.

Robles argues on appeal that his conviction should be reversed because the charges were elevated to felonies through the use of a repealed statute and the trial court erroneously admitted statements he made in violation of his Fifth Amendment rights as set forth in *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Finally, Robles asserts his sentence constitutes cruel and unusual punishment. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On February 14, 1999, security guard Javier Chapa heard a vehicle in the adjacent street make unusual noises and then observed a Corsica drive off of the center median. The Corsica started to make a left turn, but could not complete the turn because of mechanical problems. The driver of another vehicle and Chapa helped push the Corsica out of the roadway. When Chapa approached the Corsica, he observed the driver had red watery eyes and emitted an odor of alcohol. Chapa thought the driver was drunk. After the Corsica was pushed to the side of the road, the driver took empty beer cans and an ice chest out of the front passenger seat and put them into the trunk. The police arrived three to five minutes later.

Fresno Police Officer Irel V. Del Valle responded to the accident. Chapa pointed to the Corsica indicating that it was the involved vehicle. The left front and rear tires of the Corsica were flat and there was oil underneath the car. Robles was in the driver's seat. When Del Valle approached the vehicle, she observed Robles attempt to start the vehicle several times even thought the engine was running. Del Valle also smelled a

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[1] All statutory references are to the Vehicle Code unless otherwise indicated.

strong odor of alcohol emitting from the vehicle. Del Valle asked Robles to step out of the vehicle. Robles replied, "You need to help me. I might fall." When Del Valle asked Robles to step out of the car a second time he said, "I'm too … drunk."

Robles eventually got out of the vehicle. Del Valle observed that he had an unsteady gait and a strong odor of alcohol emitting from his person. Del Valle decided it was unsafe to ask Robles to perform a field sobriety test because of his instability. Del Valle placed Robles under arrest for driving while intoxicated. Del Valle found eight bottles of beer and a twenty-four-ounce can of beer in the trunk of the vehicle.

When Del Valle entered the patrol vehicle to fill out the paperwork associated with the arrest Robles said to her, "Yes. I drank seven or eight beers just before you stopped me. I'm … drunk. Don't take my license. I just got it back."

Del Valle transported Robles to the hospital for a blood test. After he was advised of his rights as required by *Miranda*, Robles admitted driving the vehicle, stated he had been drinking beer throughout the day and was drinking beer while driving the Corsica.

The first count of the first amended information charged Robles with felony driving of a motor vehicle with a blood alcohol content of .08 or higher. (§ 23152, subd (b).) The second count charged Robles with felony driving a vehicle while under the influence of alcohol or drugs. (§ 23152, subd. (a).) Each count alleged the violation was a felony pursuant to section 23175.5 because Robles was convicted of a felony violation of section 23153, subdivision (b) in 1991. In addition the information alleged that Robles had suffered two convictions which constituted strikes, one for murder in 1973 (Pen. Code, § 187) and the other for attempted kidnapping in 1985 (Pen. Code, §§ 664, 207, subd. (a)). Finally, Robles allegedly served three prior prison terms within the meaning of Penal Code section 667.5 as a result of two prior strike convictions and the 1991 conviction for causing bodily injury while driving under the influence of alcohol. (§ 23153, subd. (b).)

In addition to the above facts, the trial testimony established that Robles had a blood alcohol level of .28. Robles admitted drinking prior to the accident and having an open container in the vehicle prior to the accident.

In a bifurcated proceeding the jury returned a verdict of guilty on both counts and found all the allegations true.

DISCUSSION

I. The Expired Statute

Currently, violations of section 23152 may be sentenced as either a misdemeanor or a felony if the conditions of section 23550.5[2] are met. Section 23550.5 gives the sentencing judge this option where the defendant was convicted in the preceding 10 years (1) with a violation of section 23152 which was punished as a felony, (2) with a violation

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[2] This statute states:

"(a) A person is guilty of a public offense, punishable by imprisonment in the state prison or in a county jail for not more than one year and by a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000) if that person is convicted of a violation of Section 23152 or 23153, and the offense occurred within 10 years of any of the following:

"(1) A prior violation of Section 23152 that was punished as a felony under Section 23550 or this section, or both, or under former Section 23175 or former Section 23175.5, or both.

"(2) A prior violation of section 23153 that was punished as a felony.

"(3) A prior violation that was punished as a felony under Section 191.5 of, or paragraph (1) or (3) of subdivision (c) of Section 192 of, the Penal Code. The person's privilege to operate a motor vehicle shall be revoked by the Department of Motor Vehicles under paragraph (7) of subdivision (a) of Section 13352.

"(b) Any person convicted of a violation of Section 23152 that is punishable under this section shall be designated an habitual traffic offender for a period of three years, subsequent to the conviction. The person shall be advised of this designation under subdivision (b) of Section 13350."

of section 23153, or (3) with a violation of Penal Code sections 191.5 or 192, subdivisions (c)(1) or (c)(3).

Section 23550.5 became operative on July 1, 1999. (Stats. 1998 (Sen. Bill No. 1186), ch. 118, § 84.) Prior to that date, the same option for sentencing was provided by section 23175.5.[3] Section 23175.5 was repealed on July 1, 1999, by the same legislation that enacted section 23550.5.

Robles was arrested on February 14, 1999. The original and first amended information in this case were both filed after July 1, 1999, but alleged that the case was a felony within the provisions of section 23175.5. Apparently no one recognized that section 23175.5 had been repealed until this appeal. Robles now contends that his conviction must be reversed because he was convicted with the use of a repealed statute.

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[3] This statute read:

"(a) A person is guilty of a public offense punishable by imprisonment in the state prison or by imprisonment for not more than one year in the county jail and by a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000) if that person is convicted of a violation of Section 23152 or 23153, and the offense occurred within 10 years of any of the following:

"(1) A prior violation of Section 23152 that was punished as a felony under Section 23175 or this section, or both.

"(2) A prior violation of Section 23153 that was punished as a felony.

"(3) A prior violation that was punished as a felony under Section 191.5 of the Penal Code or paragraph (1) or (3) of subdivision (c) of Section 192 of the Penal Code. The person's privilege to operated a motor vehicle shall be revoked by the Department of Motor Vehicles under paragraph (7) of subdivision (a) of Section 13352.

"(b) Any person convicted of a violation of Section 23152 that is punishable under this section shall be designated an habitual traffic offender for a period of three years, subsequent to the conviction. The person shall be advised of this designation under subdivision (b) of Section 13350."

The question presented is whether the trial court could impose a felony sentence when the pertinent statute cited in the information was repealed and reenacted in substantially identical form in a different section. Robles presents various arguments to support his position that he could only be sentenced to a misdemeanor.[4] The People argue that the enactment of section 23550.5 simultaneously to section 23175.5's repeal establishes that the Legislature intended the punishment should remain the same and the erroneous reference in the information is excusable.

We reject Robles's argument that a felony sentence is prohibited in this case because the Legislature did not prohibit his conduct. The Legislature prohibited his conduct (driving while intoxicated and with a blood alcohol level above .08) and authorized a felony sentence. In renumbering the statute the Legislature did not change the penalties or the conditions under which the acts could be sentenced as a felony. The only defect in this case is the reference in the information to a repealed statute. Therefore, Robles's citation to such cases as *People v. Dillon* (1983) 34 Cal.3d 441, 461 and *People v. Nasalga* (1996) 12 Cal.4th 784, 787, are inapposite.

Nor does *In re Estrada* (1965) 63 Cal.2d 740, assist Robles. The issue addressed in *Estrada* was what punishment should be imposed for a crime when the Legislature mitigated the punishment after the crime was committed but before the defendant was sentenced. The Supreme Court held the legislative intent required the lesser sentence be imposed. (*Id*. at pp. 744-745.) Here, there is no question of the legislative intent nor is there a difference between the punishment to which Robles was subject under either statute.

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[4] A misdemeanor sentence would preclude sentencing under the three strikes law and the prior prison term enhancements.

Robles does not cite any authority which addresses the effect of an incorrect citation in the information or the related question of whether the repeal of section 23175.5 abated the court's ability to impose a felony sentence.

The purpose of the information is to inform the defendant of the charges he must be prepared to meet at trial. (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 189.) The information is sufficient "if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused…." (Pen. Code, § 952.) An information need not specify by number the statute the defendant is charged with violating. (*People v. Thomas* (1987) 43 Cal.3d 818, 826.)

The first and second counts of the information and the first amended information stated, "It is further alleged that pursuant to Vehicle Code section 23175.5 the defendant(s) suffered the following prior felony conviction(s)." The information then described Robles's 1991 conviction for violation of section 23153, subdivision (b). The information and first amended information also described Robles's two prior convictions which constituted strikes.

The preliminary hearing was held on December 8, 1999, after the repeal of section 23175.5. At the preliminary hearing the People offered a certified copy of Robles's Department of Motor Vehicle driving record showing the felony conviction for violation of section 23153, subdivision (b). Robles argued at the hearing that there were irregularities in the 1991 conviction so that it should not qualify as a prior conviction under section 23175.5. In making his argument, Robles identified the issue as whether he had a prior felony driving under the influence conviction within the last 10 years. Robles also identified the offense as a "wobbler" and made a motion under Penal Code section

17, subdivision (b) to reduce the charges to a misdemeanor. These arguments demonstrate that Robles was fully aware of the charges pending against him.

Thomas provides guidance on this issue. The defendant in *Thomas* was convicted of involuntary manslaughter. On appeal he argued that the conviction was improper because the information charged him with violation of former Penal Code section 192, subdivision (1),[5] voluntary manslaughter. The defendant argued that he was actively misled by the pleading to believe he was charged only with voluntary manslaughter to the exclusion of all other crimes. The Supreme Court rejected the argument noting that the language in the information charged defendant with general manslaughter without specifying voluntary or involuntary. (*People v. Thomas, supra,* 43 Cal.3d at pp. 827-828.) "As we have seen, the specific enumeration of 'Section 192.1' in the information is not controlling if the specific language in the accusatory pleading is sufficient to inform the defendant of the charges to which he should prepare a defense. [Citation.]" (*Id*. at p. 827.) The Supreme Court also concluded that even if the information was erroneous, there was no evidence that the error was prejudicial. (*Id*. at pp. 828-829.)

Analogous is *Isaac v. Superior Court* (1978) 79 Cal.App.3d 260. In *Isaac*, the defendant was charged in the information with attempted extortion in violation of Penal Code sections 664 and 518. Attempted extortion is a violation of Penal Code section 524. The appellate court agreed that the trial court properly overruled defendant's demurrer to the information. (*Id*. at pp. 262-263.) "There is no requirement that the information name the statute which the accused is charged with violating, so long as the charging language adequately informs the accused of the act which she is charged with committing. [Citations.] Here the charging language informed petitioner that she is charged with an 'attempt to obtain an official act of a public officer, to wit, Chief of

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5 This subdivision is now designated subdivision (a).

Police, by the wrongful use of force or fear.' This adequately states an offense under Penal Code section 524 …." (*Isaac v. Superior Court, supra,* 79 Cal.App.3d at p. 262; accord, *People v. Hillard* (1989) 212 Cal.App.3d 780, 783; *People v. Ellis* (1987) 195 Cal.App.3d 334, 339.)

These cases establish that an erroneous allegation in the information does not constitute error if the information adequately informs the defendant of the charges with which he is faced. While the information referred to the repealed statute, the wording of the information adequately informed Robles that he was facing felony prosecution because of his violation of section 23153 within the preceding 10 years. Thus, the reference to section 23175.5 did not render the information defective. Moreover, since Robles knew this wobbler offense was being charged as a felony, it is inconceivable that he suffered any prejudice from the erroneous statutory designation. Thus, if there was error, it was harmless. (*People v. Thomas, supra,* 43 Cal.3d at pp. 828-829.)

Nor must we reverse the conviction because repeal of the statute abated the prosecution. The common law doctrine of abatement provides that when the Legislature repeals a criminal statute, the act described in the statute is no longer prohibited. The purpose of the doctrine is to give effect to the presumed intention of the Legislature. (*People v. Colbert* (1988) 198 Cal.App.3d 924, 928.) "Where the Legislature has seen fit to repeal a statute making certain acts a crime it is reasonable to assume that in the absence of a saving clause the Legislature would not have desired that anyone should be punished for what, by the repeal, it has now determined is not a crime…." (*Sekt v. Justice's Court* (1945) 26 Cal.2d 297, 308.) However, the rule of abatement does not apply when the Legislature has merely renumbered a criminal statute. "Numerous California cases recognize that the rule barring prosecution under a repealed statute does not apply when the repealed statute is substantially reenacted, because in such cases 'it will be presumed that the legislative body "did not intend that there should be a remission of crimes not reduced to final judgment." ' [Citations.]" (*Henry v. Municipal Court*

(1985) 171 Cal.App.3d 721, 725; *People v. Alexander* (1986) 178 Cal.App.3d 1250, 1261.)

Accordingly, the erroneous reference to section 23175.5 in the information does not preclude a felony conviction.

II. The Motion to Suppress

After Del Valle approached Robles, he made numerous statements that were incriminating. Robles asserts that one of his statements should have been suppressed because it was obtained in violation of his rights pursuant to *Miranda*.

When Del Valle approached Robles she asked him to get out of the car. He responded that he was too drunk. Del Valle assisted Robles out of the car and Robles again stated he was drunk. In response, Del Valle asked Robles how much he had to drink. Robles stated he had seven to eight beers shortly before Del Valle arrived. Robles asserts this last statement should have been suppressed.

The question presented by these facts is whether Robles was in custody at the time he responded to Del Valle's question. Robles asserts that at the time Del Valle had sufficient evidence to arrest him for drunk driving. Robles points out that Del Valle observed his blood shot eyes, smelled the odor of alcohol and heard two statements that he was drunk. The People assert that Del Valle's question was part of a routine investigation and was asked before Robles was placed in custody.

We are required to review de novo a motion to suppress a statement allegedly obtained in violation of the defendant's Fifth Amendment rights, while accepting all factual determinations of the trial court which are supported by substantial evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Our task is made easier because there is no factual dispute about what occurred on the night of Robles's arrest.

"*Miranda* requires that a criminal suspect be admonished of specified Fifth Amendment rights. But in order to invoke its protections, a suspect must be subjected to *custodial interrogation*, i.e., he must be 'taken into custody or otherwise deprived of his

freedom in any significant way.' [Citation.] '[T]he ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citations.]" (*People v. Morris* (1991) 53 Cal.3d 152, 197, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Berkemer v. McCarty (1984) 468 U.S. 420 is dispositive. The defendant in *Berkemer* had been stopped for a traffic violation. The traffic officer asked the defendant to step out of the vehicle. When the defendant did so, the officer noticed that he was having difficulty standing. The officer concluded at that point that the defendant would be charged with a traffic offense and that his freedom to leave the scene was terminated. However, the defendant was not told he would be taken into custody. The defendant failed the field sobriety test. His speech was slurred and defendant was difficult to understand. While at the scene of the stop, the officer asked the defendant several questions and received incriminating responses. Among the questions asked was whether the defendant had been using intoxicants, the defendant responded that he had drank a few beers and smoked some marijuana. The defendant was thereafter arrested.

The Supreme Court held the defendant was not subject to a custodial interrogation while stopped at the roadside. (*Berkemer v. McCarty*, *supra*, 468 U.S. at pp. 440-441.) The Supreme Court relied on two factors. First, most roadside stops are temporary and brief unlike the extended police headquarter custodial interrogation at issue in *Miranda*. (*Berkemer v. McCarty*, *supra*, 468 U.S. at pp. 437-438.) Second, the typical motorist does not feel completely at the mercy of the officer since the stop occurs in public view. (*Id*. at p. 438.)

> "[The defendant] has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Only a short period of time elapsed between the stop and the arrest. At no point during that interval was [the defendant] informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as [the defendant] stepped out of his car that [the defendant] would be taken into custody and charged

> with a traffic offense, Williams never communicated his intention to [the defendant]. A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Nor do other aspects of the interaction of Williams and [the defendant] support the contention that [the defendant] was exposed to 'custodial interrogation' at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked [the defendant] a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest." (*Berkemer v. McCarty, supra,* 468 U.S. at pp. 441-442, fns. omitted.)

There is no significant distinction between *Berkemer* and this case. A single police officer asked a modest number of questions. The officer's subjective determination that Robles would be arrested is of no import. This was a routine traffic stop that resulted in Robles's arrest. The statements made by Robles prior to his arrest were admissible.

Even if we assume, arguendo, that the statement was inadmissible, the error in admitting the statement was harmless beyond a reasonable doubt. (*People v. Bradford*, *supra,* 14 Cal.4th 1005, 1037.) The spontaneous statements made by Robles to which no objection is lodged, the strong odor of alcohol emanating from him, his red watery eyes, and his blood alcohol level of .28 establish beyond a reasonable doubt that Robles was guilty of the charged offenses. Robles's statement to Del Valle that he had seven or eight beers was merely icing on the cake. By any objective standard, if there was error in this case, it was harmless beyond a reasonable doubt.

III. Cruel and Unusual Punishment

Robles argues that his sentence constitutes cruel and unusual punishment in violation of both the United States Constitution (the Eight Amendment) and the California Constitution (art. I, § 17).

The Eighth Amendment prohibits cruel or unusual punishment. However, numerous cases have held that the three strikes law does not violate the Eighth Amendment. (E.g., *People v. Cooper* (1996) 43 Cal.App.4th 815, 824; *People v. Cline* (1998) 60 Cal.App.4th 1327.)

In support of his argument Robles cites *Solem v. Helm* (1983) 463 U.S. 277, 288. However, as this court explained in *Cooper*, *Solem* was substantially weakened by *Harmelin v. Michigan* (1991) 501 U.S. 957. (*People v. Cooper, supra,* 43 Cal.App.4th at pp. 820-824.) After *Harmelin*, the Eighth Amendment precludes, at most, extreme sentences that are grossly disproportionate to the crime and permits intra- and inter-jurisdictional comparisons only in the rare cases in which the threshold comparison of the crime committed and the penalty imposed leads to an inference of gross disproportionality. (*People v. Cooper, supra,* 43 Cal.App.4th at p. 823.)

Article I, section 17, of the California Constitution also prohibits cruel or unusual punishment. Punishment may violate the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) The *Lynch* court identified three techniques to administer this rule. First, courts should examine the nature of the offense and/or the offender. (*Id*. at p. 425.) Second, courts should compare the punishment with the penalty for more serious crimes in the same jurisdiction. (*Id*. at p. 426.) Third, courts should compare the punishment to the penalty for the same offense in different jurisdictions. (*Id*. at p. 427.)

Our analysis begins by recognizing that the three strikes law punishes not only for the current crime, but also for recidivism. (*People v. Cline, supra,* 60 Cal.App.4th at p. 1338.) Were Robles punished only for felony violation of section 23152, his sentence would have been either 16 months, 2 or 3 years. (Pen. Code, § 18.) It is only because he had two prior strikes that he was subject to a 25-year-to-life sentence.

The first *Lynch* factor requires examination of the nature of the offense and/or the offender. Robles insists that this factor favors a finding that the punishment is cruel or unusual because the offense was nonviolent. Robles ignores the significant danger he posed to himself and every other driver in his vicinity, as vividly demonstrated by the 1991 incident which resulted in the death of his granddaughter and injuries to his wife and another child. Fortunately, Robles's excursion did not result in any injuries, but this result may be attributed to luck rather than a nonviolent offense.

The nature of the offender also is significant. Robles's criminal history as listed in the probation report begins with a conviction for armed robbery in 1968. (Pen. Code, § 211.) Robles was 17 years old at the time of the conviction. In 1971 Robles was convicted of assault with a deadly weapon or force likely to produce great bodily injury (Pen. Code, § 245.) In 1971 and 1972 Robles was convicted of disorderly conduct (Pen. Code, § 647, subd. (f).) In 1972 Robles again was convicted of assault with a deadly weapon. (Pen. Code, § 245.) In 1973 Robles was sentenced to life in prison as a result of a conviction for first degree murder. (Pen. Code, § 187.) He was paroled in 1983. In 1983 and 1984 he was convicted for driving under the influence. Later in 1984 he violated his parole. In 1985 he again was convicted of assault with a deadly weapon (Pen. Code, § 245) and he was sentenced to six years in prison for attempted kidnapping. (Pen. Code, §§ 664, 207, subd. (a).) He was paroled in late 1988 and violated parole in 1989. In 1990 he was convicted of driving with an open container on his person (§ 23222, subd. (a)), and in 1991 he was convicted of negligently driving with a blood alcohol content in excess of .08 and causing bodily injury to three victims while so

impaired. (§§ 23153, subd. (b), 23182.) Robles was sentenced to seven years in prison, but apparently paroled as if he had been sentenced to a three-year term.[6]

This history establishes that Robles has spent the majority of his adulthood in prison for various crimes, including several violent felonies. On two occasions he was responsible for the death of another, first in 1973 for first degree murder and the second time in 1991 while driving with a blood alcohol level in excess of .08. He has violated parole and demonstrated a blatant disregard of lawful behavior throughout adulthood.

The second *Lynch* factor requires comparison between the punishment for the current crime and punishment for more serious crimes. However, "this step is inapposite to three strikes sentencing because it is a defendant's 'recidivism in combination with his current crimes that places him under the three strikes law. Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [defendant's] punishment for his "offense," which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons.' [Citation.]" (*People v. Cline, supra,* 60 Cal.App.4th at p. 1338.)

The final *Lynch* factor requires comparison between the penalty for this crime in this state with the penalty for similar crimes in other states. Once again, we are comparing punishment for Robles's recidivist behavior. *People v. Ayon* (1996) 46 Cal.App.4th 385, overruled on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 593, noted that California's three strikes sentencing scheme is part of a nationwide pattern calling for more severe sentences for recidivist behavior, with many states

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6 It is unclear from the record how this occurred. Robles contends the abstract of judgment is incorrect and he should have received only a three-year sentence. The reason for the discrepancy is not important to any issue on appeal.

providing life sentences for repeat offenders, and several providing life sentences without the possibility of parole. (*People v. Ayon, supra*, 46 Cal.App.4th at p. 400.)

Robles provides a comprehensive review of the law in the other states and contends that his punishment is more severe than in any other jurisdiction. According to Robles, New York , Texas, Alabama and Montana each provide for life imprisonment under the circumstances of this case. However, in New York the sentence would only be applicable if the history and character of the defendant, when combined with the circumstances of the crime indicate that extended incarceration would best serve the public interest. (N.Y. Pen. Code, § 70.10.) Robles asserts he would be eligible for parole after 10 years in Texas, while the sentence in Alabama and Montana would be for 10 years to life, so he would be eligible for parole much sooner than in California. Robles asserts that the remaining states either do not have recidivist statutes, or the recidivist statutes provide punishment of less than life imprisonment, or the recidivist statutes apply only to violent or serious felonies, or have indeterminate sentencing.

Robles also relies on *Wanstreet v. Bordenkircher* (1981) 276 S.E.2d 205. In this case, the West Virginia Supreme Court held that a life sentence for the defendant convicted of forging a $43 check, who had prior convictions for forging an $18.61 check and arson for burning down a barn worth $490 violated the proportionality clause in the West Virginia Constitution.[7] The West Virginia Supreme Court held that the third felony was entitled to more scrutiny than the prior felonies, but that all the crimes must be considered. (*Id*. at p. 212.)

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[7] The material portion of the West Virginia Constitution at the time was article III, section 5 which read: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence."

We do not find *Wanstreet* analogous on either a factual or legal basis. First, the defendant in *Wanstreet* was convicted of three nonviolent felonies. Robles has convictions for murder, assault with a deadly weapon, armed robbery and attempted kidnapping, not to mention his numerous other convictions and the death he caused while driving intoxicated in 1991. Second, the West Virginia Supreme Court interpreted the proportionality clause in the West Virginia Constitution. The California Constitution does not contain a proportionality clause.

Nor do we find the comparison to the recidivist statutes in other states persuasive. Robles's comparison, which for the purposes of this opinion we accept at face value, establishes that in four other states he would receive a life sentence for this crime because of his recidivist nature. While it appears to be true that three of those states would grant an earlier parole than Robles will be eligible for in California, that is not in itself dispositive. Even if California has the harshest penalty in the country, it does not automatically follow that the sentence constitutes cruel and unusual punishment. First, if the punishment exceeds that in other states, it is only a consideration in determining whether the sentence is cruel and unusual. (*In re Lynch*, *supra*, 8 Cal.3d at p. 427.) Second, "the needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state. Nothing in the prohibition against cruel or unusual punishment per se disables a state from responding to changed social conditions and increasing the severity with which it treats its recidivist felons." (*People v. Cooper*, *supra*, 43 Cal.App.4th at p. 827.)

Robles's citation to numerous recent California cases does not assist his argument.[8] Robles is correct that each of these cases is distinguishable because the crime

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[8] *People v. Cartwright* (1995) 39 Cal.App.4th 1123, *People v. Kinsey* (1995) 40 Cal.App.4th 1621, *People v. Askey* (1996) 49 Cal.App.4th 381, *People v. Ayon*, *supra*, 46

for which the defendant was sentenced differed from Robles's conviction. However, that fact does not compel the conclusion that Robles's sentence constitutes cruel or unusual punishment.

The determination of sentences is not an exact science. The Legislature is obligated to consider the evils to be addressed, the policies involved, the will of the People and the alternatives in deciding the proper sentencing scheme for recidivist offenders. We are required to give great deference to the Legislature's decisions and may interfere only if either the United States Constitution or the California Constitution prohibits the sentence. (*In re Lynch, supra,* 8 Cal.3d at pp. 414-415.)

Bearing in mind our limited review and Robles's criminal history, we do not find that this is one of those rare cases where the sentence imposed leads to an inference of gross disproportionality. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1005 [concurring opinion Kennedy, J.].) Nor is Robles's punishment "out of all proportion to [his crimes]" so as to shock the conscience and offend fundamental notions of human dignity. (*In re Lynch, supra,* 8 Cal.3d at pp. 424-425.) Robles has spent much of his adult life in prison as the result of serious and violent felonies. [9] Despite the harm he has caused to himself, his victims and his family, he continues to ignore the laws of this state. The three strikes law was aimed at the recidivist behavior demonstrated by Robles and does not constitute cruel and unusual punishment.

Cal.App.4th 385, *People v. Diaz* (1996) 41 Cal.App.4th 1424, and *People v. Cooper, supra,* 43 Cal.App.4th 815.

9 Robles's history of serious and violent felonies distinguishes *Andrade v. California* (9th Cir. 2001) __ U.S. ___ [DJ D.A.R. 11769], in which a panel from the Ninth Circuit determined that a three strikes sentence was cruel or unusual punishment as applied to that defendant. The factor relied on by the court in *Andrade* was that the defendant was not convicted of any violent felonies.

DISPOSITION

The judgment is affirmed.

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Cornell, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Wiseman, J.